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THE EUROPEAN ORDER FOR PAYMENT – AN EFFECTIVE MECHANISM FOR RECOVERING CROSS-BORDER CLAIMS

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Abstract

The rapid and efficient recovery of certain liquid and due claims is a goal assumed by the Member States of the European Union, having a special importance for economic operators in the European Union, as late payments are a major cause of insolvency, which increasingly threatens small and middle sized enterprises.

Thus, the European Parliament adopted Regulation (EC) no. 1896/2006 establishing a procedure for issuing a joint European order for payment, as well as Regulation (EC) no. 861/2007 establishing a common European debt procedure, the purpose of which is to simplify, speed up and reduce the costs of settling cross-border disputes concerning uncontested pecuniary claims by issuing a European order for payment and ensuring the free movement of European order for payments, legal transactions and documents in all Member States by setting minimum standards the observance of which makes any intermediate procedure in the Member State of enforcement unnecessary before recognition and enforcement.

Keywords: *European civil procedure, European order for payment, cross-border litigation, debt recovery, European order for payment*

INTRODUCTION

The Tampere European Council (1999) called on the EU Council and the Commission to adopt a program of measures on the initiation of a European Enforcement Order, but also on those aspects of procedural law for which minimum standards are considered necessary to ensure the implementation of the principle of mutual recognition, while observing the fundamental principles enshrined in the content of the EU Treaties (point 37 of the proposed Program of Measures, published in January 2001). It was appreciated that the principle of

mutual recognition of judicial and extrajudicial decisions is the "keystone" of international judicial cooperation (Tampere European Council Meeting, Oct. 1999).

The Lisbon Treaty, on the segment of judicial cooperation in criminal matters, in art. 81 TFEU states that the Union develops judicial cooperation in civil matters with cross-border implications, based on the principle of mutual recognition of judicial and extrajudicial decisions (M. Pătrăuș, *Drept Instituțional European*, 2021, p. 145). At the same time, the Treaty provides that the cooperation may include the adoption of measures to approximate the laws, regulations and administrative provisions of the Member States.

Although there was previously a possibility in the TEC to adopt measures to harmonize the civil procedures of the Member States, this is strengthened by the current provision of the Treaty and is based on the need for minimum harmonization to facilitate mutual recognition of judgments.

Mutual recognition of judicial decisions in civil matters, a fundamental concept in the field of judicial cooperation, helps overcome the difficulties generated by the diversity of judicial systems in the European space (http://ec.europa.eu.justice/recognito-decision/index_en.htm).

In the context of the growing development of national and international trade relations, it has been concluded at European level that it is necessary and useful for European citizens to find a legislative solution, based on the principle of mutual trust, through which to achieve as soon as possible, the recovery of certain, liquid and due claims, so that, for this purpose, numerous agreements have been concluded between the Member States of the European Union, in order to facilitate the development of contractual relations between different parties, which are part of different national states, considering at European level the adoption of a single instrument in this regard, the European order for payment.

I. THE EUROPEAN ORDER FOR PAYMENT

I.1 European regulations

The European order for payment is an instrument of judicial cooperation in civil matters, based on the principle of mutual recognition of judgments and lies in a firm, accelerated, simplified and efficient mechanism capable of facilitating the recovery of claims arising from trade relations between individuals, corporate bodies of the various European member states of the European Union.

This procedure is regulated at European level by ***EC Regulation no. 1896 of 12 December 2006 on the establishment of a European order for payment procedure.***

The purpose of a European legislative solution established by this Regulation is to simplify, speed up and reduce procedural costs in cross-border disputes concerning uncontested pecuniary claims, by establishing a European single order for payment procedure, and to ensure the freedom of movement of European order for payments within all Member States by setting minimum standards by which no

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intermediate procedure is required in the Member State of enforcement before recognition and enforcement.

By adopting Regulation no. 1896/2006, the first real European civil procedure was created at European level - the European order for payment procedure (<http://ec.europa.eu/justice/civil/>).

The procedure was preceded by **Regulation No. 805/2004 on the European Enforcement Order (TEE)**, main achievement of which was the elimination of the *exequatur* for the execution of judgments handed down in another Member State of the European Union in certain categories of civil cases, subject to compliance with certain procedural guarantees, which must be confirmed by a competent authority by a pre-established certificate.

Subsequently, by **EC Regulation no. 1896 of 12 December 2006 on the establishment of a European order for payment procedure**, a unitary European order for payment procedure was established for the recovery of certain, liquid and due claims resulting from trade relations between nationals of Member States, between natural persons, legal persons, professionals or not, on the date on which the application for a European order for payment is submitted.

The scope of the Regulation is that it applies in civil and commercial matters and whatever the nature of the court (in the case of judgments, court settlements and authentic instruments concerning uncontested claims). It does not apply to:

- (a) the condition and capacity of natural persons, matrimonial regimes, wills and successions;
- (b) bankruptcies, proceedings for the dissolution of companies or other insolvent legal persons, agreements and other similar proceedings;
- (c) social security;
- (d) arbitration.

To initiate the procedure, form A of Annex no. 1 to the Regulation has to be filled in with full details of the parties, as well as the nature and amount of the claim (these forms are available to citizens of the European Union, and not only, on the website <https://e-justice.europa.eu> in all languages. By accessing this page, any interested person can also obtain information on the courts that can issue a European order for payment and to which the application form should be submitted).

Thus, the applicant's application is typed and contains the following elements:

- a) *the name and address of the parties and, as the case may be, of their representatives, as well as of the notified court;*
- b) *the amount of the claim, in particular the main and, where applicable, interest, contractual penalties and costs;*
- c) *where interest on the claim is charged, the interest rate and the period for which such interest is charged, unless legal interest is automatically added to the main debit under the law of the home Member State;*
- d) *the cause of action, including the description of the circumstances invoked as the basis of the claim and, as the case may be, of the required interest;*

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- e) *a description of the evidence in support of the claim;*
 - f) *the basis of the competence;*
 - g) *the cross-border nature of the dispute within the meaning of Article 3 of the Regulation.*

In the application, the claimant must state that to the best of their knowledge the information provided is accurate and acknowledge that any intentional false statement risks attracting the penalties provided for by the law of the home Member State. It is important to note that the introduction of a European order for payment entails the payment of any costs incurred.

1.2 European and national jurisprudence

The request for a order for payment shall be lodged with the competent court of the State of origin. By *Decision no. 693 of February 27, 2015 pronounced by the Second Civil Section of the High Court of Cassation and Justice having as object a negative conflict of competence* - the High Court of Cassation and Justice ruled that, if a legal person of Romanian nationality formulated a request for the issuance of a European order for payment directed against a natural person domiciled in Romania, for a claim referring to a loan agreement, from this document not resulting that the defendant-debtor natural person would have concluded the respective contract for a use that could be considered as related to their professional activity, the provisions of art. 6 para. (2) of Regulation E.C. no. 1896/2006 which establish that, in such a situation, the jurisdiction to resolve the request for the issuance of the European order for payment belongs to the court of the Member State of the European Union in which the defendant-debtor resides.

By the Sentence 124/2016 of the Bihor Tribunal, the unpublished Commercial and Administrative Litigation Section having as object a European order for payment, it was held that, by the request registered on role of the Aleșd Court, the plaintiff H.-Z. A.S. SP. ZO.O requested in contradiction with SC R. SA the issuance of the European order for payment for the amount of 62,739.20 Euros, an amount to be increased with interest, contractual penalties and court costs. The application completed according to the form -A of the EC Regulation no. 1896/2006 shows that the dispute has a cross-border character and concerns a certain, liquid and due claim, which arose on the basis of a sale-purchase contract concluded with the defendant, which has the quality of consumer and domicile on the territory of Romania and which has not fulfilled their obligation to pay for the delivered goods. By the pronounced sentence, the Aleșd Court admitted the exception of the material incompetence of the Court and ordered the decline of the competence to settle the case having as object a European order for payment in favor of the Bihor Court.

In order to rule this decision, it was noted that from a material point of view, the code of civil procedure is the one that regulates the competences of the courts and distinguishes between the competence that belongs to the courts and the one that belongs to the courts from a material point of view in commercial matters. Thus, according to art. 95 paragraph 1 letter a of the Code of Civil Procedure, the courts judge in the first instance all the claims that are not given by law in the competence

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of other courts. As in the present case it was a commercial claim whose object was in the amount of over 200,000 lei, the Aleşd Court, admitted the exception and declined the material competence in favor of the Bihor Court, considering that the value of the claim falls within the court's resolution. The case was registered with the Bihor Court, Commercial and Administrative Litigation Section. In accordance with the provisions of Article 8 of EC Regulation 1896 / 2006, the Court proceeded to verify that the conditions laid down in Articles 2, 3, 4, 6 and 7 on the basis of the elements indicated in the application for order for payment and, finding that the elements of the application are met, given that the application is issued according to Annex I form A of EC Regulation 1896/2006 at art.7, the dispute being of a commercial nature and having a cross-border character, the court proceeded to issue the European order for payment, using the form E of Annex V, for the total amount of 65,739.20 Euros, of which the amount of 62,739.20 Euros representing the main debit and 3000 euro expenses, as well as the payment of 8% interest calculated until the date of actual payment. Pursuant to Article 12 (3) of the Rules of Procedure, the defendant was informed of the possibility of paying the applicant the amount indicated in the order for payment or of opposing the order for payment by objecting to the court of origin, the European order for payment being communicated to the defendant together with the request made by the creditor and the form of opposition to the European order for payment - form F - annex 6.

On 16.09.2010 within 30 days from the date of communication of the European order for payment, the defendant filed an opposition to the European order for payment, using the form provided in Annex 6. According to the provisions of Article 17 "if an opposition has been filed within the period laid down in Article 16 (2), the proceedings shall continue before the competent courts of the home Member State in accordance with the rules of civil procedure of common law, unless the applicant has expressly requested that the proceedings be terminated in that case. The transition to ordinary civil proceedings within the meaning of paragraph 1 shall be governed by the law of the home Member State." In the present case, it was apparent from the examination of the application for payment that the applicant had not expressly requested that the proceedings be terminated in the event of opposition to the order for payment. As in the Romanian legal system, in the situation of rejecting the request for order for payment due to the non-fulfillment of the conditions regarding the certainty, liquidity and enforceability of the payment obligation, by contesting the claim, a new lawsuit must be filed by common law, which must be either in accordance with the provisions of art. 194 of the Code of Civil Procedure, and having regard to the main purpose of the Regulation in simplifying, speeding up and reducing procedural costs in cross-border cases concerning uncontested pecuniary claims, the Court of First Instance annulled the European order for payment, following that the procedure continues in the competent courts, in this case the Bihor Court, at the request of the applicant.

In the Romanian legislation the competence is regulated in the content of art. 94-96 Cpc.

In the judgment of 10 March 2016 of the Court of Justice of the European Union (Second Chamber) in Case C 94/14 in *Flight Refund Ltd v Deutsche Lufthansa AG*, the Court stated that: *"EU law must be interpreted as meaning that, in circumstances where a court is seised of a procedure, such as that in the main proceedings, concerning the designation of the court of the Member State of origin of a European order for payment having territorial jurisdiction and examines, in those circumstances, the international jurisdiction of the courts of that Member State to hear the contentious proceedings concerning the debt which gave rise to such an order for payment against which the defendant has entered a statement of opposition within the time-limit prescribed for that purpose:*

- since EC Regulation No 1896/2006 does not provide any indications as to the powers and obligations of that court, those procedural questions continue, pursuant to Article 26 of that regulation, to be governed by the national law of that Member State;

- Regulation No 44/2001 requires the question of the international jurisdiction of the courts of the Member State of origin of the European order for payment to be decided by application of procedural rules which enable the effectiveness of the provisions of that regulation and the rights of the defence to be guaranteed, whether it is the referring court or a court which the referring court designates as the court having territorial and substantive jurisdiction to hear a claim such as that at issue in the main proceedings under the ordinary civil procedure which rules on that question;

- if a court such as the referring court rules on the international jurisdiction of the courts of the Member State of origin of the European order for payment and finds that there is such jurisdiction in the light of the criteria set out in Regulation No 44/2001, that regulation and Regulation No 1896/2006 require such a court to interpret national law in such a way that it permits it to identify or designate a court having territorial or substantive jurisdiction to hear that procedure, and,

- if a court such as the referring court finds that there is no such international jurisdiction, that court is not required of its own motion to review that order for payment by analogy with Article 20 of Regulation No 1896/2006."

The application shall be submitted on paper or by any other means of communication accepted by the home Member State and which can be used by the court of origin, including electronically.

The court notified with an application for a European order for payment shall, as soon as possible, examine the applicant's claim and, on the basis of the application form, whether the conditions set out in Articles 2, 3, 4, 6 and 7 of the Regulation are met and the claim appears to be founded. This examination can also be performed using an automated procedure - as is the case for example in Belgium, the Netherlands, the United Kingdom.

If the application does not meet the conditions laid down in the Regulation, the court shall give the applicant the opportunity to complete or rectify the application, unless it is manifestly unfounded or inadmissible. For this purpose, the court uses the form B in Annex II to the Regulation. Where the court requests the applicant to

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complete or rectify the application, it shall set a time limit which it considers appropriate in the light of the specific circumstances of the dispute. The court may extend this period if it deems it useful.

If the application meets only part of the conditions of the Regulation, the court shall inform the applicant thereof using the form C in Annex III to the Regulation. The claimant is invited to accept or reject a proposal for a European partial order for payment for the amount determined by the court and is informed of the consequences of his decision. The claimant can respond by sending back the type C form that the court sent to them within the term established by it. If the claimant accepts the court's proposal, the court issues a European order for payment, in accordance with Article 12 of the Regulation, for the part of the application which has been accepted by the claimant.

If the claimant does not send the answer within the time limit set by the court or rejects its proposal, the court **rejects the European order for payment in its entirety**.

It is important to note that the rejection of the application does not prevent the claimant from recovering his claim by a new European order for payment or by any other procedure provided for by the law of a Member State, if they do so within the time limit provided by law, in order not to be opposed by the prescription of the material right to action, as it is regulated in the state of origin.

If the conditions set out in the Regulation are fully met, the court shall issue the European order for payment as soon as possible and in principle within thirty days from the submission of the application, using the form E in Annex V to the Regulation.

The European order for payment shall be issued together with a copy of the application form. It does not contain the information provided by the claimant in points 1 and 2 of the form A attached to the Regulation.

In the European order for payment, the defendant is informed of the possibility:

- a) to pay to the claimant the amount which is mentioned in the order for payment; or
- b) to oppose the order for payment by opposing the court of origin, an opposition which must be sent within thirty days from the date on which the summons was communicated or notified to them. The defendant is also informed that:
 - the summons was issued only on the basis of the information provided by the claimant and was not verified by the court;
 - the summons shall become enforceable unless there has been an opposition in court, in accordance with Article 16 of the Regulation;
 - where the opposition proceedings have been brought before the competent courts of the home Member State in accordance with the rules of civil procedure of common law, unless the claimant has expressly requested that the proceedings be terminated in that case.

The court shall ensure that the order for payment is communicated or notified to the defendant in accordance with national law, in accordance with the procedures laid down in the minimum standards laid down.

In accordance with the case law of the CJEU (C 119/13 and C 120/13) revealed in several cases, the Court has consistently stated that: “Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 establishing a European order for payment procedure should be interpreted as meaning that the procedures provided for in Articles 16 to 20 of this Regulation are not applicable **where a European order for payment has not been communicated or notified in accordance with the minimum rules laid down in Articles 13 to 15 of that Regulation.** Where such an irregularity is found only after the declaration of enforceability of a European order for payment, the defendant must have the opportunity to denounce that irregularity, which must lead, if duly substantiated, to the invalidity of that declaration of the executory force”. The Court also stated in its judgment of 22 October 2015 in the Court of Justice of the European Union (Fourth Chamber), in Case C 245/14, in *Thomas Cook Belgium NV v. Thurner Hotel GmbH*: “**Article 20(2) of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, as amended by Commission Regulation (EU) No 936/2012 of 4 October 2012, must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, a defendant on whom a European order for payment has been served in accordance with that regulation from being entitled to apply for a review of that order by claiming that the court of origin incorrectly held that it had jurisdiction on the basis of allegedly false information provided by the claimant in the application form.**”

Against the European order for payment, the defendant may file within 30 days from the date of communication or notification of the European order for payment, an opposition, application for opposition which is registered in the court of origin using the form F of Annex VI to the Regulation transmitted together with the European order for payment.

The opposition must be sent within thirty days from the date of communication or notification of the summons to the defendant, this being the express term provided for the exercise of the opposition. The defendant states in opposition that he/she disputes the claim without having to state the reasons for that appeal.

If the defendant has objected, the proceedings shall continue before the competent courts of the home Member State in accordance with the rules of civil procedure of common law, unless the applicant has expressly requested that the proceedings be terminated in that case.

The procedure continues in accordance with the rules:

- a) the European small claims procedure, provided for in Regulation (EC) no. 861/2007, if applicable; or
- b) any appropriate *national civil procedure*.

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If the claimant has not indicated which of the procedures he/she requests to be applied to his/her claim in the following procedure if the defendant objects or if he/she has requested the application of the European Small Claims Procedure provided for in Regulation (EC) No. 861/2007, a claim which does not fall within the scope of that Regulation shall be transferred to the appropriate national civil procedure, unless the applicant has expressly requested that no such transfer be made.

It should be noted, however, that opposition to a request for a European order for payment is not an appeal. The appeal that can be exercised against the decision by which the opposition formulated by the defendant to the European order for payment was wrongly rejected is the request for re-examination regulated by art. 20 para. (2) of Regulation (EC) no. 1896/2006 establishing a European order for payment procedure, and not the appeal. By Decision no. 527 of 13 February 2014 of the Civil Section of the Bihor Court, it was established that the appeal that can be exercised against the decision by which the opposition formulated by the defendant to the European order for payment was wrongly rejected is the request for re-examination regulated by art. 20 para. (2) of Regulation (EC) no. 1896/2006 establishing a European order for payment procedure, and not the appeal.

If no opposition has been made to the court of origin, the court of origin shall immediately declare that the European order for payment is enforceable, using the form G in Annex VII. The court verifies the date on which the payment order was communicated or notified.

A European order for payment which has become enforceable in the Member State of origin shall be recognized and enforced in the other Member States without a declaration of enforceability being required and without its recognition being open to challenge. The advantage of this procedure is that, unlike a court decision issued on the basis of common law, which must be recognized (by the executor procedure) this procedure does not need to be subject to the executor, which makes the actual settlement of the dispute to be greatly shortened.

The defendant has the right to request a re-examination of the European order for payment before the competent court of the home Member State if:

- a) the order for payment has not been communicated or notified in accordance with one of the procedures provided for in Article 14 of the Regulation; and*
- b) the communication or notification did not intervene in due time to enable him/her to prepare his/her defense, without this being attributable to him/her, or*
- c) the defendant has been prevented from contesting his/her claim for force majeure or due to extraordinary circumstances, without this being attributable to him/her, provided that, in both cases, he/she **acts promptly**.*

After the expiry of the time limit laid down in Article 16 (2) of the Regulation, the defendant shall also have the right to seek a review of the European order for payment before the competent court of the home Member State where the payment

order was manifestly erroneously issued, taking into account the requirements set out in this Regulation or taking into account other exceptional circumstances.

If the defendant does not file an opposition, the European order for payment **automatically becomes enforceable**. *However, failure to comply with the time-limit for objecting to a European order for payment on account of the guilty conduct of the defendant's representative does not justify a review of that order for payment, since such non-compliance does not fall within exceptional circumstances within the meaning of Article 20 (1) para. (1) letter (b) of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 establishing a European order for payment procedure, even in extraordinary circumstances, within the meaning of paragraph (2) of the same Article (C-324/12).* According to the jurisprudence of the CJEU (C-144/12) „Article 6 of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, read in conjunction with Article 17 thereof, must be interpreted as meaning that a statement of opposition to a European order for payment that does not contain any challenge to the jurisdiction of the court of the Member State of origin cannot be regarded as constituting the entering of an appearance within the meaning of Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and the fact that the defendant has, in the statement of opposition lodged, put forward arguments relating to the substance of the case is irrelevant in that regard”.

If the court rejects the defendant's request for re-examination on the grounds that none of the conditions for re-examination is met, the European order for payment remains valid. If the court decides that the review is justified on the grounds that one of the conditions for the review is met, the European order for payment is null and void.

Once it has become enforceable, a copy of the European order for payment and, if necessary, a translation thereof must be sent to the enforcement authorities of the Member State in which it is to be enforced. The enforcement shall be carried out in accordance with the national rules and procedures of the Member State in which the enforcement takes place. In order for the other party (defendant or debtor) to comply with the judgment rendered against it (for example, to make a payment), the creditor will have to appeal to the authorities responsible for enforcing the judgments. Only they have the power to compel the debtor to pay, using the coercive force of the home state if necessary. Under the Brussels I Regulation (reformation) governing the recognition and enforcement of judgments in cross-border cases, if there is an enforceable judgment handed down in a Member State of the Union, the creditor may refer to the enforcement authorities of another Member State - for example, the state in which the debtor has assets - without the need for any intermediate procedure (the regulation cancels the "exequatur" procedure).

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CONCLUSIONS

In general, the procedure for the execution of the European order for payment seeks the recovery of sums of money, but this may also concern the fulfillment of other types of obligations (obligation to do or not to do, such as delivery of goods, completion of works or non-infringement a property) and is intended to facilitate the recovery of certain liquid and due claims in a relatively short time.

Various European procedures (such as the European order for payment, the European Small Claims Procedure and the European Enforcement Order) can be used in cross-border civil cases, but for all this, the judgment must be enforced in accordance with national rules and procedures in the state in which enforcement takes place by the authorities carrying them out (courts, debt collection agencies and bailiffs) (usually the place where the debtor or his/her assets are located), these procedures being laid down by the national law of the Member State in which the enforcement is expected.

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